

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRANDYN GAYLER.

Case No. 2:17-cv-01492-RFB-CWH

Plaintiff,

SCREENING ORDER

v.

NDOC – HIGH DESERT STATE
PRISON, *et al.*,

Defendants.

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis* and a motion for appointment of counsel. (ECF No. 1, 1-1, 3). The matter of the filing fee shall be temporarily deferred. The Court now screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A and addresses his motion for appointment of counsel.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:

1 (1) the violation of a right secured by the Constitution or laws of the United States, and
2 (2) that the alleged violation was committed by a person acting under color of state law.
3 See *West v. Atkins*, 487 U.S. 42, 48 (1988).

4 In addition to the screening requirements under § 1915A, pursuant to the Prison
5 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim if "the
6 allegation of poverty is untrue" or if the action "is frivolous or malicious, fails to state a
7 claim on which relief may be granted, or seeks monetary relief against a defendant who
8 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
9 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
10 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
11 reviewing the adequacy of a complaint or an amended complaint. When a court
12 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
13 complaint with directions as to curing its deficiencies, unless it is clear from the face of
14 the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
15 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

16 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
17 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
18 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
19 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
20 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
21 allegations of material fact stated in the complaint, and the court construes them in the
22 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
23 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
24 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
25 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
26 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
27 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
28 insufficient. *Id.*

1 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
2 that, because they are no more than mere conclusions, are not entitled to the assumption
3 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
4 provide the framework of a complaint, they must be supported with factual allegations.”
5 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
6 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
7 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
8 specific task that requires the reviewing court to draw on its judicial experience and
9 common sense.” *Id.*

10 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
11 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
12 includes claims based on legal conclusions that are untenable (e.g., claims against
13 defendants who are immune from suit or claims of infringement of a legal interest which
14 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
15 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
16 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

17 **II. SCREENING OF COMPLAINT**

18 In the complaint, plaintiff sues multiple defendants for events that took place at
19 High Desert State Prison (HDSP). (ECF No. 1-1 at 1). He sues NDOC – High Desert
20 State Prison, Governor Brian Sandoval, Director James Dzurenda, Deputy Director David
21 Tristan, Warden Brian E. Williams, Associate Warden Jerry Howell, Associate Warden
22 Jennifer Nash, Associate Warden Bruce Stroud, and Associate Warden Perry Russell.¹

24 ¹ The Court dismisses, with prejudice, all claims against the NDOC because the
25 NDOC is an arm of the State of Nevada and is not a “person” for purposes of 42 U.S.C.
26 § 1983. See *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997);
27 *Black v. Nevada Dep’t of Corr.*, 2:09-cv-2343-PMP-LRL, 2010 WL 2545760, *2 (D. Nev.
June 21, 2010). Furthermore, to the extent Plaintiff purports to sue HDSP, all claims
28 against HDSP are dismissed with prejudice as HDSP is an inanimate building, not a
person or entity subject to liability. See *Allen v. Clark Cnty. Det. Ctr.*, 2:10-CV-00857-
RLH, 2011 WL 197201, *4 (D. Nev. Jan. 20, 2011) (finding that “[t]he law defines persons
as including natural persons (i.e., human beings) as well as corporations and political
subdivisions. However, objects such as buildings do not fit within this definition.”).

1 (ECF No. 1-1 at 1, 4-10). Plaintiff alleges nine claims and seeks monetary damages and
2 injunctive relief. (*Id.* at 39, 42).

3 In the complaint, Plaintiff alleges the following: During all relevant times, Plaintiff
4 was housed in protective segregation (P-Seg) at HDSP, where he was incarcerated due
5 to his conviction for attempted sexual assault. (ECF No. 1-1 at 8, 10). Plaintiff was in P-
6 Seg at his own request. (*Id.* at 8, 10-14). Plaintiff is a former member of a street gang
7 known as the Nortenos, who are rivals of another street gang, the Surenos. (*Id.* at 12-
8 13). There are more Surenos than Nortenos at HDSP. (*Id.* at 13). Because of Plaintiff's
9 former affiliation with the Nortenos, he did not feel safe during yard time at HDSP. (*Id.*)
10 Plaintiff also did not feel safe in the HDSP yard because he believed that inmates like
11 himself who are convicted of sexual offenses are more prone to threats and violence from
12 other inmates. (*Id.*) Plaintiff therefore chose to be housed in P-Seg at HDSP. (*Id.* at 13-
13 14).

14 Depending on the HDSP inmate's custody level, the inmate receives a scheduled
15 amount of daily dayroom access to use the phone, take a shower, cook, and socialize.
16 (*Id.* at 15, 17). Depending on the inmate's custody level, inmates also receive a
17 scheduled amount of outdoor recreation in yard time and a scheduled amount of indoor
18 recreation time (including use of the gym facilities) per week. (*Id.*) Inmates also receive
19 a scheduled amount of times to access the chapel for religious services and to have contact
20 visits with approved visitors. (*Id.* at 15-16, 18). In addition, they receive scheduled
21 appointment dates to see a physician. (*Id.* at 16, 18).

22 Level 2 P-Seg inmates at HDSP, such as Plaintiff, receive approximately 25-28
23 hours of dayroom access per week, four hours of outdoor recreation per week, two hours
24 of indoor recreation (gym time) per week. (*Id.* at 19). P-Seg inmates at HDSP also have
25 limited access to physician appointments and generally must fill out a medical form to set
26 up an appointments for medical care. (*Id.* at 31). P-Seg inmates at HDSP wait up to 60
27 days to receive medical treatment for any conditions other than emergencies. (*Id.* at 31).

1 HDSP P-Seg inmates do not have access to free weights and are limited in their exercise
2 opportunities in the outdoor recreation yard. (*Id.* at 20). Plaintiff also alleges that P-Seg
3 inmates are not allowed to practice their religions or hold services during dayroom time,
4 yard time, or indoor recreation gym time. (*Id.*) P-Seg inmates are limited to one visit per
5 week for three hours for local visitors or six hours for long distance visitors. (*Id.*)

6 Plaintiff further alleges, upon information and belief, that some inmates at other
7 NDOC institutions, such as Lovelock Correctional Center and Northern Nevada
8 Correctional Center, who would be classified as P-Seg inmates if they were at HDSP,
9 receive more opportunities at their prisons to access the dayroom, outdoor recreation
10 yard, indoor recreation gym, religious services, medical treatment, and visitation. (*Id.* at
11 21-23).

12 Plaintiff attempted to bring the different treatment to the attention of Defendants
13 Dzurenda, Tristan, Williams, Howell, Nash, Stroud, and Russell by filing grievances. (*Id.*
14 at 24). He was not successful at obtaining any changes at HDSP through the grievance
15 process. (*Id.* at 28).

16 In his nine counts, Plaintiff alleges that each of the Defendants violated his
17 Fourteenth Amendment right to equal protection. (*Id.* at 29, 27, 32, 26, 34, 35, 36, 38,
18 and 39). They did this by failing to allow Plaintiff the same opportunities to access the
19 day room, outdoor recreation yard, indoor recreation gym, religious services, medical
20 treatment, and visitation as inmates at other NDOC institutions who would be classified
21 as P-Seg inmates if they were housed at HDSP. (*Id.* at 27, 32-35, 26, 34-33, 35, 36-37,
22 38, 40). He alleges that his right to be equal to other similarly situated inmates should
23 have been known to the Defendants. (*Id.* at 29). In addition, he alleges that each of the
24 Defendants was responsible for making and enforcing constitutional policies with respect
25 to inmate equal protection and failed to do so, as there is a pattern of unequal treatment
26 through the NDOC and the Defendants did not standardize policy to comply with the
27 constitution. (*Id.* at 27, 25, 26, 33, 35, 37, 38, and 40).

28

1 The Equal Protection Clause of the Fourteenth Amendment is essentially a
2 directive that all similarly situated persons be treated equally under the law. *City of*
3 *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). “Similarly situated”
4 persons are those “who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S.
5 1, 10 (1992).

6 When analyzing an equal protection claim under the Fourteenth Amendment, the
7 courts must first determine the appropriate level of scrutiny to be applied. If the defendants
8 acted with the intent and purpose to discriminate against the plaintiff based upon
9 membership in a protected class or substantially burden a fundamental right², the court
10 will apply a strict scrutiny standard. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th
11 Cir. 2001); *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003). If no such suspect
12 class or fundamental rights are involved, the conduct or rule must be analyzed under a
13 rational basis test. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

14 In *Olech*, the Supreme Court explicitly addressed “whether the Equal Protection
15 Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did
16 not allege membership in a class or group.” 528 U.S. at 564. The Supreme Court ruled
17 in the affirmative and “recognized successful equal protection claims brought by a ‘class
18 of one,’ where the plaintiff alleges that she has been intentionally treated differently from
19 others similarly situated and that there is no rational basis for the difference in treatment.”
20 *Id.*; see also *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 601 (2008) (recognizing that
21 an equal protection claim may be maintained in some circumstances even if the plaintiff
22 does not allege class-based discrimination, “but instead claims that she has been
23 irrationally singled out as a so-called ‘class of one’”). The Supreme Court held that “the
24 purpose of the equal protection clause of the Fourteenth Amendment is to secure every
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26 ² To determine whether a right is a “fundamental right,” courts generally look to the
27 Constitution to see if the right infringed has its source, explicitly or implicitly, in the
28 Constitution. *Plyler v. Doe*, 457 U.S. 202, 218 n.15 (1982).

1 person within the State's jurisdiction against intentional and arbitrary discrimination,
2 whether occasioned by express terms of a statute or by its improper execution through
3 duly constituted agents." *Id.*

4 However, although the Supreme Court has acknowledged the class-of-one theory
5 of equal protection, it has held that the theory applies only in certain limited
6 circumstances; it does not apply when the state actions "by their nature involve
7 discretionary decisionmaking based on a vast array of subjective, individualized
8 assessments." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 603 (2008) (holding that
9 the class-of-one theory does not apply in the public employment context); see also
10 *Towery v. Brewer*, 672 F.3d 650, 660–61 (9th Cir. 2012). "[A]llowing a challenge based
11 on the arbitrary singling out of a particular person would undermine the very discretion
12 that such officials are entrusted to exercise." *Engquist*, 553 U.S. at 604 (recognizing that
13 a traffic officer does not violate the Equal Protection Clause merely because the officer
14 gives tickets to only some speeding drivers). The Supreme Court has recognized that
15 the problem with allowing class-of-one claims to go forward in a context where
16 government officials are necessarily making subjective, individualized decisions is that
17 the government will be forced to defend a multitude of such claims and courts will be
18 obliged to go through them in search of the rare needle in a haystack. *Engquist*, 553 U.S.
19 at 608-09.

20 Thus, a person cannot state an equal protection claim merely by dividing all
21 persons not injured into one class and alleging that they received better treatment than
22 the Plaintiff did. See *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005).
23 The Fourteenth Amendment's Equal Protection Clause does not require that states treat
24 all persons within their borders identically. See *McGowan v. Maryland*, 366 U.S. 420, 425
25 (1961) ("the Fourteenth Amendment permits the States a wide scope of discretion in
26 enacting laws which affect some groups of citizens differently than others" so long as the
27 classification does not rest on grounds "wholly irrelevant to the achievement of the State's
28 objective").

1 Furthermore, to state a “class-of-one” equal protection claim, the plaintiff must
2 identify the group of individuals with whom he is similarly situated, identify the allegedly
3 intentional and disparate treatment, and allege that there was no rational basis for the
4 different treatment. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011);
5 *Chappell v. Bess*, No. 2:01-CV-01979 KJN P, 2012 WL 3276984, at *19–21 (E.D. Cal.
6 Aug. 9, 2012).

7 A defendant is liable under 42 U.S.C. § 1983 “only upon a showing of personal
8 participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A
9 supervisor is only liable for constitutional violations of his subordinates if the supervisor
10 participated in or directed the violations, or knew of the violations and failed to act to
11 prevent them. There is no respondeat superior liability under [§]1983.” *Id.*; see also
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that “[b]ecause vicarious liability is
13 inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-
14 official defendant, through the official’s own individual actions, has violated the
15 Constitution”).

16 In addition, when a plaintiff is attempting to rely on a policy to establish a
17 defendant’s liability, merely including a conclusory allegation that there is a policy is
18 insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009). The plaintiff must go beyond
19 bare assertions and plead facts sufficient to show that there is a policy, what the policy
20 is, and what role the defendant played in designing, adopting, and implementing the
21 policy. *Id.* at 678-81. If a supervisor implements a policy that may be constitutionally
22 deficient, to be liable, the supervisor must adopt and implement that policy with the same
23 state of mind required for those who are being supervised. *Cf. Ashcroft v. Iqbal*, 556 U.S.
24 662, 677 (2009).

25 The Court finds that Plaintiff has failed to state a colorable equal protection claim.
26 As an initial matter, it is not clear to the Court that Plaintiff has adequately identified a
27 similarly situated group of individuals. Plaintiff alleges that some inmates at other NDOC
28 prisons, who would be in P-Seg if they were at HDSP, are treated better than he is.

1 However, he has provided inadequate details as to these preferentially treated P-Seg
2 groups in other facilities.

3 Moreover, even assuming for purposes of this order that Plaintiff adequately has
4 alleged a similarly situated group of individuals, Plaintiff still has not stated a colorable
5 equal protection claim. Plaintiff has not adequately alleged that anyone has treated him
6 differently from how they treat others. According to the complaint, most of the Defendants
7 allegedly work at HDSP and create policies for HDSP. (ECF No. 1-1 at 9-10). There are
8 no allegations that those Defendants have anything to do with policies and inmates at
9 other prisons and that they therefore are treating prisoners elsewhere differently than they
10 are treating him.

11 Moreover, even with respect to Defendants Sandoval, Dzurenda, and Tristan, who
12 allegedly make and enforce laws and policies for the NDOC more generally, Plaintiff has
13 not adequately alleged facts that would show that these Defendants created any
14 particular policies or took any other actions to treat him differently from anyone else.
15 Plaintiff makes the speculative and conclusory allegations that some prisoners at other
16 prisons receive more opportunities than he does to access the day room, outdoor
17 recreation yard, indoor recreation gym, religious services, medical treatment, and
18 visitation contact. However, Plaintiff does not allege any facts to support such
19 conclusions. In addition, the mere fact that there may be different conditions at different
20 prisons and for different classifications or units does not show that these Defendants
21 participated in any conduct resulting in such different conditions. Furthermore, Plaintiff
22 has not adequately alleged that these Defendants purposefully singled out HDSP P-Seg
23 inmates for different treatment and has not alleged why they did so.³

25
26 ³ It is not clear to the Court whether Plaintiff is relying on a theory that his
27 fundamental rights have been substantially burdened or is relying on a class-of-one
28 theory, or both. Plaintiff should make that clear in any amended complaint. If Plaintiff is
relying on the alleged impairment of a fundamental right, in any amended complaint, he
should allege facts sufficient to show how identified fundamental rights were substantially
impaired. If he is relying on a class-of-one theory, he should allege what non-
discretionary rule Defendants applied to him in a manner that was different from how they

1 The Court therefore will dismiss this claim without prejudice, with leave to amend.
2 If Plaintiff chooses to amend this claim, he should allege facts sufficient to show who was
3 similarly situated and how they were similarly situated. He also should allege *facts*
4 sufficient to show what each Defendant did to violate his rights, including facts sufficient
5 to show what role each Defendant played with respect to adopting each policy, what each
6 particular policy was, what the Defendant's purpose was in adopting the policy, whether
7 the Defendant deliberately singled out Plaintiff for different treatment, and how that policy
8 applied to both Plaintiff and the allegedly similarly situated prisoners. Plaintiff also should
9 allege the date on which each Defendant took the alleged action.

10 Plaintiff is granted leave to file an amended complaint to cure the deficiencies of
11 the complaint. Plaintiff may not amend the complaint to add unrelated claims involving a
12 different defendant; adding such claims to an amended complaint will result in dismissal
13 of those claims. Such claims must be brought in separate lawsuits.

14 If Plaintiff chooses to file an amended complaint, he is advised that an amended
15 complaint supersedes (replaces) the original complaint and, thus, the amended complaint
16 must be complete in itself. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,
17 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the
18 original complaint is irrelevant; an amended pleading supersedes the original”); see also
19 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims
20 dismissed with prejudice, a plaintiff is not required to reallege such claims in a subsequent
21 amended complaint to preserve them for appeal). Plaintiff's amended complaint must
22 contain all claims, defendants, and factual allegations that Plaintiff wishes to pursue in
23 this lawsuit.

24 Moreover, plaintiff must file the amended complaint on this court's approved
25 prisoner civil rights form and it must be entitled “First Amended Complaint.” Plaintiff must
26 follow the instructions on the form. The “nature of the case” section shall be brief. That
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28 _____
applied that rule to a similarly situated group.

1 section need not and should not include very many facts. For each cause of action,
2 plaintiff must adequately allege facts to show what *each* defendant did to violate his rights.

3 The Court notes that, if Plaintiff chooses to file an amended complaint curing the
4 deficiencies, as outlined in this order, Plaintiff shall file the amended complaint within 30
5 days from the date of entry of this order. If Plaintiff chooses not to file an amended
6 complaint curing the stated deficiencies, this action shall be dismissed for failure to state
7 a claim.

8 **III. MOTION FOR APPOINTMENT OF COUNSEL**

9 Plaintiff has filed a motion for appointment of counsel. (ECF No. 3). A litigant does
10 not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights claims.
11 *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28 U.S.C.
12 § 1915(e)(1), “[t]he court may request an attorney to represent any person unable to
13 afford counsel.” However, the court will appoint counsel for indigent civil litigants only in
14 “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983
15 action). “When determining whether ‘exceptional circumstances’ exist, a court must
16 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to
17 articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.*
18 “Neither of these considerations is dispositive and instead must be viewed together.” *Id.*
19 In the instant case, the Court does not find exceptional circumstances that warrant the
20 appointment of counsel. Therefore, the Court denies the motion for appointment of
21 counsel.

22
23 **IV. CONCLUSION**

24 For the foregoing reasons, IT IS ORDERED that a decision on the application to
25 proceed *in forma pauperis* (ECF No. 1) is deferred.

26 IT IS FURTHER ORDERED that the Clerk of the Court will file a copy of the
27 complaint (ECF No. 1-1).

1 IT IS FURTHER ORDERED that the NDOC-High Desert State Prison is dismissed
2 with prejudice, as amendment would be futile.

3 IT IS FURTHER ORDERED that the entire complaint is dismissed without
4 prejudice, with leave to amend.

5 IT IS FURTHER ORDERED that, if Plaintiff chooses to file an amended complaint
6 curing the deficiencies of his complaint, as outlined in this order, Plaintiff shall file the
7 amended complaint within 30 days from the date of entry of this order.

8 IT IS FURTHER ORDERED that the Clerk of the Court shall send to Plaintiff the
9 approved form for filing a § 1983 complaint, instructions for the same, and a copy of his
10 original complaint (ECF No. 1-1). If Plaintiff chooses to file an amended complaint, he
11 must use the approved form and he shall write the words "First Amended" above the
12 words "Civil Rights Complaint" in the caption.

13 IT IS FURTHER ORDERED that, if Plaintiff fails to file an amended complaint
14 curing the deficiencies outlined in this order, this action shall be dismissed with prejudice
15 for failure to state a claim.

16 IT IS FURTHER ORDERED that the motion for appointment of counsel (ECF No.
17 3) is denied.

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20 DATED this 25th day of June, 2018.

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23 
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

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